IN THE

Supreme Court of the United States

October Term, 1977

Docket No. 77-1260

LESLIE ATKINSON, WILLIAM KELLY BROWN, MONROE LORENZO MARTIN, JR., WILLIAM THOMAS, RUDOLPH VALENTINO JENNINGS, JAMES McARTHUR, LESLIE SHARON ATKINSON ARRINGTON, MICHAEL OTIS ARRINGTON,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Leslie Atkinson, William Kelly Brown, Monroe Lorenzo Martin, Jr., William Thomas, Rudolph Valentino Jennings, James McArthur, Sharon Atkinson Arrington and Michael Otis Arrington pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on December 8, 1977 which affirmed judgments of conviction previously entered against each of the Petitioners in the United States District Court for the Eastern District of North Carolina, Raleigh Division, on June 5 and August 3, 1976.

Opinions Below

Following the entry of the judgments in the United States District Court, the Petitioners appealed to the Court of Appeals. The opinion of the Court of Appeals is reported at 565 F.2d 1283 (4th Cir., 1977) and is set forth in Appendix A (1a).[1] On the 5th day of January, 1978, Petitioners timely and jointly petitioned the United States Court of Appeals for rehearing and suggestion for rehearing en banc. On the 16th day of January, 1978, the Court of Appeals denied Petitioners' application. This Court granted Petitioners until March 17, 1978 in which to file this Petition for Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the right to counsel provisions of the Sixth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

These constitutional provisions are set forth in full in Petitioners' Appendix E.

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[1]The following abbreviations are used in the Petition:

"a" - is a reference to the Petitioners' Appendix which is filed with this Petition. The Appendix contains the opinion of the Court of Appeals (Appendix A); the Court of Appeals decision on Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc (Appendix B); a copy of the Order of the Supreme Court extending the Petitioners' time to file this Petition (Appendix C); the provisions of Title 21 Section 952 (Appendix D); and the applicable provisions of the United States Constitution (Appendix E).

"V" - is a reference to the approximately 3,000 pages of trial testimony and exhibits, contained in seventeen volumes which were furnished to the Court of Appeals. These volumes will be certified to this court. References in parentheses using the capital letter "A" refer to those pages in the Appendix submitted to the Court of Appeals.

Questions Presented for Review

1. Did the Trial Court Err in Failing and Refusing to Make a Judicial Inquiry as to Whether or Not There Was a Conflict of Interest When It Appeared from the Record That There Was Representation of More Than One Defendant by One Attorney?

2. What Quantum of Proof Is Necessary to Establish a Prejudicial Conflict of Interest Where One Attorney Represents Multiple Defendants?

3. Does the United States or the Defendant Bear the Burden of Persuasion in Establishing a Conflict of Interest When the Trial Court Fails to Make Any Inquiry?

4. Were the Petitioners Denied the Effective Assistance of Counsel Because of a Patent Conflict of Interest Which Stemmed from the Fact That More Than One of Them Was Represented by One Attorney?

Statement of the Case

On March 30, 1976, a three-count indictment was returned in the United States District Court for the Eastern District of North Carolina, Raleigh Division, charging Petitioners and others with various offenses concerning the importation and distribution of heroin.

More particularly, Count One of the indictment charged that from on or about August 27, 1974 up to and including March 30, 1976, all of the Petitioners, together with James Smedley, Freddie Clay Thornton, William King Wright, Robert Ernest Patterson, Jasper Myrick, Jr., Hosea Brooks, Herbert Houseton and Luchai Ruviwat (Chai) conspired and confederated to unlawfully

import heroin into the United States from Thailand.[2] As charged, the principal means for the unlawful importation was by couriers using false-bottomed furniture and luggage, by unsuspecting crew-chiefs on military aircraft and by mail (A. 36-38).

Count Two charged Petitioners Arrington with possession and possession with intent to distribute heroin on October 16, 1975.

Count Three charged Petitioner Atkinson with possession and possession with intent to distribute heroin in mid-March 1975.

Petitioners were arraigned and each pleaded not guilty. Following a lengthy jury trial, judgments of conviction were entered against each Petitioner as charged. Each of the Petitioners was sentenced to serve substantial terms of incarceration.[3] The District Court refused to stay execution of the sentences pending appeal.

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[2]James Smedley, Jasper Myrick, Robert Ernest Patterson and Freddie Clay Thornton were named in the indictment as defendants. Brooks, Houseton and Chai were named as unindicted co-conspirators. Smedley and Myrick are presently in Thai custody while Thornton and Patterson pleaded guilty and testified for the Government together with Brooks and Houseton. Wright was acquitted by the jury (V. XIII 168). Gillis was convicted but did not appeal.

[3]Specifically, the Petitioners were sentenced as follows: Leslie Atkinson received a sentence of 25 years to run consecutively with a previously-imposed sentence of 19 years (See 75-12-Cr-8 D.C. E.D.N.C.) together with fines totaling $50,000 and special parole of 9 years (A. 552). Michael and Sharon Arrington were each sentenced to serve 15 years in prison together with fines totaling $50,000 and 3 years special parole (A. 553-554). James McArthur received a prison sentence of 10 years, a fine of $10,000 and a special parole term of 3 years (A. 555). Monroe Lorenzo Martin, Jr. was sentenced to a term of imprisonment for a period of 10 years, fined $5,000 and given a special parole term of 3 years (A. 556). William Thomas received a prison sentence of 15 years, together with special parole for 3 years and a fine of $25,000 (A. 557). Rudolph Valentino Jennings received a prison term of 10 years plus 3 years special parole and a $25,000 fine (A. 558). William Kelly Brown was sentenced to serve 10 years in prison, a fine of $5,000 and 3 years special parole (A. 559).

At the time of arraignment, all Petitioners were represented jointly by Stephen Nimocks, Esq. and James MacRae, Esq. (A. 1-A.33).[4] Thereafter, various attorneys appeared on behalf of various defendants or combinations thereof.[5] At the time the trial commenced, Michael and Sharon Arrington were represented by James MacRae, Esq.(V. II 46, V. VII 172-173), who at times during the course of the trial apparently represented the Petitioner Atkinson (V. V 166 *et seq.*). Mr. Nimocks represented the Petitioners McArthur and Atkinson (V. XII 180). During the trial, Nimocks also assumed the representation of Michael and Sharon Arrington when Mr. MacRae was unable to attend the proceedings (V. IV 140-147, V. V 1-60). Monroe Martin was represented by Bobby G. Deaver, Esq. who also represented Charles Gillis. William Thomas, Rudolph Valentino Jennings and William Kelly Brown were represented by Anthony E. Rand, Esq.

Statement of Facts

1. Introduction

On September 9, 1975, following his deportation from Thailand, Freddie Clay Thornton was arrested by agents of the Drug Enforcement Administration (DEA) in San Francisco, California (V. II 445-449). Thornton's subsequent cooperation led the Government to Robert Ernest Patterson, Hosea T. Brooks and Herbert T. Houseton. Through the testimony of these four witnesses, the following story emerged.

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[4]The only exceptions were Thornton and Patterson who became witnesses for the prosecution, and Wright who was acquitted (cf A. 3).

[5]Examination of the Docket entries reveals that although Nimocks and McRae represented each of the defendants during the course of the pre-trial proceedings, various other attorneys' names later appear as counsel of record. There was no indication as to when they were substituted as counsel of record, nor does any formal notice of substitution appear in the record on appeal. See, for example, A. 1, A. 8, A. 12, A. 15, A. 19, A. 23, A. 27, A. 30.

2. The Prosecution's Case

(a) Thornton Agrees to Smuggle Narcotics

Shortly after his arrival in Thailand in February 1974, Thornton, then a Technical Sergeant in the United States Air Force, was approached by Petitioner Atkinson (hereinafter Ike) and James Smedley (hereinafter Smedley) whom he had known on two prior tours of duty in Southeast Asia (V. II 224-249).

According to Thornton, after some general conversation, he, Ike and Smedley discussed the possibility of Thornton making some money by smuggling narcotics into the United States (V. II 260-262). Over the next several months, Thornton saw Smedley on several occasions but no mention of narcotics took place. Then sometime in late July or early August 1974, Smedley asked Thornton if he wanted to make some money. All he would have to do "was take a leave" in the United States (V. II 263). Thornton agreed and thereafter received permission from the Air Force to return to the United States to attend school. He obtained a departure date of August 27 and requested a $1,000 advance against a $5,000 fee from Smedley for the work that he was going to perform (V. II 264-266). On the weekend prior to leaving for the United States, Thornton met Smedley at his home in Bangkok, took possession of two black AWOL bags, obtained his advance and Ike's telephone number in North Carolina (V. II 266-260, GX 2, 3). Thornton left Thailand on schedule and flew to Goldsboro, North Carolina via March Air Force Base in California (V. II 271-272). After checking into a motel and going to the base hospital for treatment of a shoulder ailment, he called Ike's home and then telephoned Gillis, an old Air Force buddy then stationed in Goldsboro who invited Thornton to stay at his home (V. II 272-275). After meeting at Johnson Air Force Base, Gillis, Thornton and another drove to Thornton's motel room, picked up his belongings, including the two black AWOL bags, and

returned to Gillis' home (V. II 275-277). On route, they stopped at Ike's home. In Ike's absence, Thornton left word he would return later that evening (V. II 278).

Later that evening, Thornton did return to see Ike, reported all had gone well, and the two arranged for a transfer of the AWOL bags later that evening. According to plan, the transfer took place in a remote area just outside the city limits of Goldsboro (V. II 279). The next morning, Thornton left Goldsboro for Castle Air Force Base, where he was scheduled to attend school (V. II 280).

(b) Thornton Proposes a New Method of Smuggling and the Plan Is Carried Out

Prior to leaving Goldsboro, Thornton proposed an ingenious plan for carrying contraband into the country. He suggested that in view of his supervisory power over crew chiefs, he could use them to transport AWOL bags (V. II 281). In substance, Thornton proposed to tell the crew chiefs that he had a "buddy" at an aircraft's home base and that he, Thornton, had borrowed some luggage from his friend. He would then ask the chiefs to drop off the "empty" AWOL bags on their return to the States. Finally, Thornton, in Gillis' absence and without his knowledge, proposed that Gillis pick up the bags once they were in the country (V. II 281-282). Later, Thornton told Gillis of his plans and, according to Thornton, Gillis agreed to participate in the venture, despite the fact that Gillis had no actual knowledge of what was contained in the AWOL bags (V. II 286-287).

In any event, following the completion of his course at Castle Air Force Base, Thornton in late September 1974 returned to Thailand (V. II 287). Shortly after his arrival, he met with Smedley and Ike in Bangkok (V. II 288-291). During the course of the meeting, Ike, according to Thornton, briefed Smedley as to Thornton's plan and instructed Smedley to give him whatever material was necessary

to carry out the cabal. Thornton then returned to his home base and began to put his plan in motion. First, he learned what aircraft were leaving for the States and their expected departure dates; next, he informed Smedley of the dates of departure and the dates on which he, Thornton, required the AWOL bags (V. II 291-292). Finally, he and Smedley devised a procedure for the pick-up and delivery of the AWOL bags and financing (V. II 292-294). The duo was now ready to perform. Their chance came in November 1974. Pursuant to their plan, shortly before an aircraft was to leave for Johnson Air Force Base in North Carolina, Thornton picked up two black AWOL bags from Smedley and gave the luggage to an unsuspecting crew chief who agreed to deliver the bags to Gillis (V. II 296-297). He then wrote Gillis of the plane's impending arrival, giving the aircraft's serial number, the name of the crew chief, the date it was leaving Thailand and the date it was due in North Carolina (V. II 297). The scheme worked and a second shipment was sent in early December 1974. This shipment was received by Hosea Brooks at Mather Air Force Base in California. Brooks then transferred one of the bags to Gillis, who returned it to North Carolina (V. II 297-298, V. III 34-40). A third shipment was sent to Brooks in late January or early February 1975 (V. II 299, V. III 39). This time, however, Brooks had to travel to Travis Air Force Base in California to recover the AWOL bags. Following the shipment to Travis Air Force Base, a fourth shipment was made, this time to Johnson Air Force Base in North Carolina (V. II 300-301).

On February 20, 1975, Thornton completed his tour of duty and returned to Johnson Air Force Base via Travis Air Force Base to retire. He arrived there on March 1, 1975 and retrieved one remaining AWOL bag from Brooks (V. II 315). Shortly after disembarking in North Carolina, Thornton met Gillis and the two drove to Gillis' home where Thornton stored his luggage, including the black AWOL bag he had recently acquired from Brooks

(V. II 328). Later that same night, Thornton took the black AWOL bag he had recovered from Brooks and the bags being held by Gillis (e.g., the last shipment to Johnson Air Force Base) to Ike's home. Two days later, he was paid $12,000 by Ike (V. II 331-333). This delivery formed the basis of the substantive possession count against Ike. On March 31, 1975, Thornton retired from the Air Force (V. II 333).

(c) Thornton Becomes Involved in the Furniture Business

Thornton maintained that shortly before he retired, Ike asked him to travel to California to obtain and unload a quantity of narcotics which had arrived in the States in the false bottoms of furniture (V. II 334). According to Thornton, Ike informed him that the furniture had been brought to California by an unsuspecting member of the armed services. Thornton agreed to help and consequently flew to San Francisco and drove to Travis Air Force Base to pick up the furniture. He there met the Petitioner Thomas who informed him where the furniture was located (V. II 334-336).

Thornton and Thomas then drove to the Presidio, a United States Army installation on the outskirts of San Francisco. There they learned that the furniture was being delivered to Hamilton Air Force Base on the following day (V. II 338, V. III 84-87). The furniture arrived on schedule and Thornton, with Thomas' aid, placed it in a "U-Haul Trailer" rented for the occasion and drove to San Francisco (V. II 339). The pair then split up.

Eventually, Thornton drove to the home of Ronald Ward at Beale Air Force Base in Northern California. Ward, an old friend, helped him unpack the furniture, remove the false bottoms and extract the narcotics (V. II 346-348, V. III 120-130). In return for his assistance, Ward, who was a military policeman, was paid $1,000 and given the two chests (V. IV 36 *et seq.*).

Following the recovery of the heroin, which Thornton estimated weighed 25-30 kilograms, he traveled to Greensboro, North Carolina via Sacramento and San Francisco (V. II 352). On landing in Greensboro, Thornton drove to Ike's home in Goldsboro where he transferred the contraband to Ike (V. II 351-352). Five or six days later, Thornton was paid $15,000 in cash (V. II 354). Thornton maintained that it was at this meeting that Ike asked him to run "the organization" in Thailand (V. II 355-356).

(d) Thornton Takes Control of Operations in Thailand - The Brown Shipment

According to Thornton, in early April 1975, Ike told him that a large shipment of drugs was to be sent to the States from Thailand secreted in the furniture of the Petitioner Brown, but because of internal problems the shipment had been delayed. Ike therefore requested that Thornton travel to Thailand as a supervisor (V. II 360-362). In the same conversation, Ike also told Thornton that yet another plan had been devised for the importation of drugs (V. II 361-362). This plan, according to Thornton, would revolve around the Petitioner Martin in Thailand and Patterson in Virginia and involved the transportation of "military cargo" having appropriate customs stickers. Because the packages were appropriately stickered, there would be no customs check (V. II 363-364). Finally, Ike gave Thornton detailed instructions as to how to process the "Brown furniture shipment"; he admonished Thornton not to touch anything, to make all purchases through Chai, and to let Chai make all arrangements for the packaging and delivery of the furniture (V. II 366).

On or about May 1, 1975, armed with instructions from Ike, Thornton flew to Thailand (V. II 367-368). After briefing Smedley, Thomas and the others, Thornton waited for the arrival of funds to make whatever purchases were necessary (V. II 378). They were not long in

coming. Toward the end of May, the Petitioner Martin delivered three boxes containing $213,000 to Thornton (V. II 370-371). After Thornton, with the assistance of Martin, Smedley, Houseton and Chai, had counted the money, $205,000 was given to Chai for the purchase of 50 kilograms of heroin (V. II 371-372). While waiting for the Brown transaction to be completed, Thornton began to make arrangements for the additional shipment of furniture. In this connection, he successfully recruited Jasper Myrick (V. II 386-393). Later, on Ike's instructions, Thornton agreed to allow the Myrick transaction to be handled by Smedley, which ultimately was discovered and seized before it left Thailand by agents of the military customs service (V. V 101-140, 144). The heroin taken proved to be 93% pure (V. V 144-145, GX 55-56).

By the end of June 1975, additional money began to arrive. The first mailing included $180,200, most of which was transferred to Chai in return for additional contraband (V. II 394-396). Two or three days after Chai had been paid, an additional $25,000 arrived and was transferred to Chai for 6 kilograms of heroin. Within three days, yet another package containing $10,000 arrived. Determined to complete the Myrick transaction (*supra*), Thornton attempted to reach Chai so that an additional purchase could be made. Chai, however, was nowhere to be found. Finally in mid-July, Thornton, with the help of Smedley, located their source and all problems seemed to be resolved (V. II 400-402).

Thornton, however, remained unconvinced as to Chai's loyalty. He also believed there was some disharmony among his "employees" in Thailand. He, therefore, decided to return to the United States to discuss the problem with Ike (V. II 402-405). In late July he left Thailand bound for North Carolina. However, while passing through customs at Hickam Field in Hawaii, he was seized by the customs authorities. Although no contraband was

seized, a number of papers were taken, xeroxed, and then returned to him (V. II 407-422, V. III 6-8).

Despite the seizure, Thornton was permitted to pass through customs and eventually he arrived in Raleigh, North Carolina on August 1, 1975. He there rented an automobile and drove to Goldsboro (V. II 427-429, GX 19, GX 20). Shortly after his arrival, he drove to Ike's home where he spoke with Sharon (V. II 430). According to Thornton, he, in Ike's absence, told Sharon that he believed Chai and Smedley were stealing from them; that the Myrick shipment was ready and not to send any more money (V. II 431-432, 442).[6] Sharon said her dad would be upset and agreed to visit her father in Atlanta the following Sunday and suggested that Thornton write out his grievances in letter form (V. II 433).[7] The following Sunday evening, Thornton returned to the Atkinson home. Sharon, in the presence of her husband, the defendant Arrington, told Thornton that her father, Ike, had given her five notes which he, Ike, had written. Although Sharon did not see the contents of each note, she apparently knew their contents and as Thornton read each note, Sharon explained what her father had in mind (V. II 437-440). In substance, the notes directed Smedley to return home and Thornton to take charge of the Thai operations (*ibid.*).[8] At the conclusion of the meeting, Thornton was given approximately $7,000 or $8,000 (V. II 440-441).

Thornton left Goldsboro on August 4 and returned to Thailand via Washington, D.C., El Paso, Texas, and San Francisco (V. II 443). Shortly after disembarking in Thai-

[6]In July 1975, Ike was sentenced to serve 19 years in a related case. He was, therefore, in Atlanta Federal Penitentiary.

[7]Records at the Atlanta Penitentiary reveal that Sharon and her husband, Michael, did visit Ike on August 31, 1975 (V. V 63, V. V 72-87, and GX 53).

[8]Although Arrington was present, he took no part in the conversation (V. II 440).

land, he informed all concerned of Ike's instructions (V. II 444). Shortly after his return, he was deported by Thailand and arrested by agents of the DEA when he arrived in San Francisco, California (V. II 445-446).

(e) Thornton Feigns Cooperation and Carries Out the Brown Transaction

Following his arrest, Thornton feigned cooperation and testified before a grand jury in San Francisco. Accordingly, he told the authorities "just enough so that they would think (he) was cooperating and let (him) go" (V. II 449). Despite the fact that his arraignment was scheduled for September 29, Thornton was permitted to travel freely (V. II 450 *et seq.*). He therefore traveled to Detroit, Michigan and then, with financial help from Gillis, to Goldsboro, North Carolina (V. II 450-452). Shortly after arriving in Goldsboro, he and Gillis drove to Raleigh where they met Sharon and Michael Arrington (V. II 453-454).

During the course of this conversation, Thornton explained that he had been charged with aiding in the sale of heroin by Chai to an undercover agent but that the case would eventually be dismissed (V. II 476). Thornton asked about the "Brown Furniture" and Sharon replied that it had arrived, but her father had instructed that it be let alone "until everything was cooled off." Thornton agreed and suggested that a "safe" method of communication be arranged between himself and Sharon (V. II 475-477). Finally Sharon gave Thornton $5,000 (V. II 478).

Funded by Sharon, Thornton flew back to Detroit, purchased an automobile, and drove to Virginia to visit his family. Inspired by his family visit, Thornton decided that despite Ike's admonition, he would pick up the Brown shipment (V. II 481). This was to be his "last hurrah."

In the early morning of October 14, Thornton arrived in Augusta, Georgia, checked into the "Dutch Motel"

using the pseudonym Frank Scott, called Brown, and arranged to meet with him later that day (V. II 481-485, V. IV 150-153, GX22). At their meeting, Brown told Thornton that he had arranged to have his "legitimate" furniture moved out of storage and into his home that day. The two would therefore have to wait until that task was completed before unloading the furniture which had arrived from Thailand (V. II 486-487). Thereafter, Thornton, with Brown's help, began to unload the false-bottomed furniture and pack the contraband in four pieces of luggage that Brown had purchased for the occasion. During the course of unpacking, Thornton called Sharon at the pay phone on two separate occasions: first to inform her he was taking the shipment and secondly to inform her he would be a day late (V. II 488-492). The following afternoon, Brown and Thornton completed their task (V. II 494-498, GX 24, 25).

According to Thornton, he and Brown extracted 50 kilograms from seven pieces of furniture (V. II 498). Examination of the residue found on the inside of the Brown furniture, after seizure by search warrant and consent, revealed the presence of pure heroin. Thornton then told Brown that someone would be at his home within two or three days to pick up the furniture. Brown replied "the sooner the better" (V. II 498). Thornton then drove to Goldsboro, North Carolina (V. II 501-502). After spending the night at the guest house of Johnson Air Force Base, he drove to Gillis' home (V. II 502, GX 26). Over coffee, he told Gillis of his recent acquisition. They then called Sharon and arrangements were made for a final transfer of the contraband later that evening (V. II 503-504). That evening, as planned, Thornton and Gillis transferred the drugs from Thornton's car to the Arringtons' automobile.[9] During the course of the transaction, Sharon

[9]This transfer formed the basis for the substantive possession count against Sharon and Michael Arrington.

gave Thornton $40,000 (V. II 506-509). Later that evening, Thornton left Goldsboro and drove to Detroit via Raleigh, North Carolina and Beckley, West Virginia (V. II 509-510, GX 27). Shortly after his return to Detroit, Thornton was summoned to San Francisco by agents of the DEA. It was at this time that Thornton agreed to fully cooperate with the Government (V. II 513-518).

(f) Thornton Becomes a Government Agent

Subsequent to his decision to fully cooperate with the DEA, Thornton met with Agent Don Ashton of the DEA (V. II 592). At Ashton's request, Thornton called Brown in Augusta (V. II 548, GX 31). On the day following his call to Brown, Thornton met with Gillis, Sharon and Mike Arrington at the Holiday Inn in Raleigh (V. II 550).[10] During the course of the conversation (which took place in Gillis' automobile), Thornton told Sharon that Brown had been arrested and she should get the "Brown drugs" out of North Carolina. Sharon later responded that her dad instructed her not to touch the contraband (V. II 550-553). traband (V. II 550-553).

(g) The Patterson Packages

In late August or early September 1974, Robert Patterson, then a member of the Air Force stationed at Langley Field in Virginia, received a telephone call from Ike (V. III 104-105). As a result of that telephone call, Patterson travelled to Goldsboro, North Carolina where he met Ike (V. III 105). At their meeting, Ike told Patterson that he had some packages containing narcotics which would be arriving by mail at Langley. Ike asked that Patterson watch for the packages and let him know when they arrived. For this Patterson was promised between five and seven thousand dollars per package (V. III 105-106). Patterson agreed. Thereafter, Ike travelled to Bangkok to

[10]According to Thornton, neither Arrington nor Gillis participated in the conversation.

"square away that end." When he returned in late February or early March 1975, Patterson again travelled to Goldsboro to "work out all the details" (V. III 106-107). During the course of this meeting, Patterson maintained that Ike told him that Jimmy Martin would handle the mailings from Thailand but that Patterson would have to get address labels for use on the packages (V. III 197).

Thereafter, Patterson returned to Langley, obtained the address labels, and returned to North Carolina, where he delivered them to Ike (V. III 108). In May 1975, Ike called Patterson and told him he would no longer be available. He therefore arranged for a man named "Mike" to pick up any packages that would arrive (V. III 109). Subsequently, sometime in June 1975, Ike invited Patterson to a poker game in Goldsboro so that Patterson could physically view "Mike" (V. III 110-111). Patterson accepted Ike's invitation and drove to Ike's home with William Wright and the Petitioner McArthur, two of his long-time poker friends (V. III 112-113). Shortly after he arrived, Ike pointed out "Mike", who was in a group. Ike was very explicit that Patterson should not reveal what was going on (V. III 114).[11] As Patterson was leaving the card game, Ike gave him two small packages to send to Martin in Thailand (V. III 116). Although "Mike" subsequently called Patterson on two or three occasions, no packages ever arrived (V. III 116-117).

(h) The Golden-Trowery Transactions

On September 11, 1974, agents of the DEA seized AWOL bags from Martin Trowery and Richard Golden, who had just arrived from Thailand. Examination of the bags revealed the presence of 1600 grams of almost pure heroin concealed under false bottoms (V. V 150 *et seq.*, V. VI 4-14, GX 58, 58a, 58b, 59, 59a, 59b). A comparison of

[11]At trial, Patterson identified the defendant Arrington as the person introduced to him as "Mike" in Ike's den (V. III 114).

several sets of latent finger and palm prints taken from the false bottoms matched the known finger and palm prints of Ike and Jennings (V. V 190-199, V. VIII 35, 46-47.)

(i) The Houseton Mailings

On or about June 30, 1974, Herbert Houseton, an administrative supervisor in the Air Force postal service, arrived in Thailand (V. VI 15-17). Shortly after his arrival, Houseton, in August 1974, met the Petitioner McArthur, who asked him to assist in sending packages of used clothing back to the States (V. VI 18). Houseton, who had known McArthur for some time, complied, but by the third mailing he became curious as to the real contents of McArthur's packages. He therefore flouroscoped the contents and found that indeed the packages contained clothing (V. VI 18-20). Subsequently, McArthur approached Houseton with a number of additional packages, all of which McArthur claimed contained clothing (V. VI 22-23). After several weeks, McArthur suggested that Houseton be paid $400 per package if he would ask no questions, assist addressing the packages, and assist filling out their customs tags. Houseton agreed and began to receive payment (V. VI 22-23).

Throughout the fall of 1974, the packages continued to arrive and Houseton and McArthur, after wrapping and addressing them, continued to send them to the United States (V. VI 25-27).

As the weeks went by, Houseton became more involved in the packaging, addressing and mailing of McArthur's "old clothes" and AWOL bags (V. VI 28-33). In early January 1975, McArthur told Houseton that he was being returned back to the States and gave Houseton four packages for mailing. At the time he left, McArthur, according to Houseton, owed Houseton $2,700 for mailing the packages and repairing McArthur's automobile (V. VI 31).

Shortly after McArthur had returned to the United States, Houseton received a telephone call from Ike asking him to come to the Jennings-Thomas residence in Bangkok (V. VI 33-34). Houseton agreed and the two met at the Jennings-Thomas home. Houseton maintained that as a result of this meeting, Ike offered and he accepted McArthur's position in the organization. Accordingly, Houseton received $4,000 for each package that he arranged to ship from Thailand to North Carolina (V. VI 35-36). During the same conversation, Ike, according to Houseton, briefed him on the "entire operation" and showed him a closet which was divided into two parts. The left side of the closet would contain AWOL bags for Houseton's use, while the right side contained work in progress (V. VI 36-37, GX 62). At the conclusion of the conversation, Houseton took four AWOL bags and a number of North Carolina addresses so that he could complete his mission, and agreed to visit the Jennings-Thomas home each day to pick up additional AWOL bags. Subsequently, Ike asked Houseton to recruit an assistant. Houseton agreed and obtained the aid of Jasper Myrick (of furniture fame). Houseton told Myrick that he would be paid $200 per package but never told him what the packages contained (V. VI 43-46). Houseton thus developed the following method of operation which was used on a number of occasions: he would go to the Jennings-Thomas home, pick up AWOL bags and addresses, and bring them to Myrick's home. Myrick would then follow through on the mailings with addresses supplied by Houston. Over the course of the weeks that followed, Houseton sent a total of fourteen packages (V. VI 47-49). Sometime in late January the packages stopped (V. VI 49). In return for his participation, Houseton received a total of approximately $35,000 (V. VI 49, 55, 61 and 64).

3. The Defense

(a) Introduction

All defendants, except Leslie Atkinson, Michael Arrington and William Thomas, testified on their own behalf and all denied any participation in the illegal activities charged. In addition, Sharon Arrington produced three witnesses who testified to her good reputation for truth and veracity.

(b) Testimony Presented on Behalf of Sharon Arrington

Sharon Arrington, the 24-year-old daughter of Leslie Atkinson, acknowledged that Freddie Clay Thornton had come to her father's home on or about August 2, 1975 and told her that it was very important that he get a message to Atkinson, who, at the time, was serving the sentence imposed on his *nolo* pleas in the United States Penitentiary at Atlanta, Georgia (V. IX 13-15). Sharon agreed to take Thornton's message to her father and later on that night Thornton gave her a sealed envelope which Sharon did not open (V. IX 15-16). The next morning, she and her husband, Michael Arrington, went to the penitentiary. When Sharon told her father the purpose of her visit, he got quite angry at her and told her that prisoners were to receive mail only through the postal service and that if he were observed reading unauthorized mail it might result in his losing certain privileges (V. IX 16-17). Atkinson never opened the letter and told Sharon to return it to Thornton and to tell Thornton that he should stay away from Atkinson's family (V. IX 17-18). Sharon and Michael returned to North Carolina, returned the unopened envelope to Thornton, and informed him of Atkinson's request that Thornton stay away from Sharon and the rest of the Atkinson family (V. IX 17-18).

Sharon testified that the next time she saw Thornton was during October 1975, when Gillis came to her apartment in Raleigh and asked her to go talk with Thornton,

who was at the Holiday Inn (V. IX 19). Sharon, Michael and Gillis drove to the vicinity of the hotel, where Gillis telephoned Thornton and told him to meet them downstairs. When Thornton arrived, the four of them drove around town. During the ride, Thornton told Sharon that her father owed him some money. Sharon repeated her father's instructions that Thornton stay away from Sharon and the family (V. IX 20). Sharon denied that Thornton ever gave her any narcotics, that she had ever trafficked in narcotics in any manner, and that she had ever participated in establishing a telephone "code" with Thornton (V. IX 21-22, 30).

In addition, Sharon produced the Rev. J.P. Buckraham, Paul Overton and Virginia Knight Dawson, each of whom testified that Sharon had an excellent reputation for truthfulness and veracity (V. IX 127-129, V. X 61-63, V. X 64-65).

(c) Testimony Presented on Behalf of Monroe Lorenzo Martin

Martin testified that he met James Smedley during December 1974 at the military post office in Bangkok, to which Martin had recently been assigned (V. X 7). Smedley had come into the post office with a complaint about some of his mail which had been returned to the United States as undeliverable, and as the supervisor, it was Martin's job to attempt to straighten the matter out (V. X 9). After discussing the matter, Smedley left. Martin remembered having delivered two packages to Smedley as a personal favor, after Smedley had signed a form authorizing Martin to remove Smedley's mail from the post office (V. X 28-29).

Martin denied any participation in a plan to import narcotics (V. X 29-30). He never assisted Thornton or Smedley count a large sum of cash; he never entered into an agreement with Atkinson or Patterson to mail narcotics labelled as military cargo to the United States; he never

participated in mailing AWOL bags to the United States; and he never received a package from Atkinson or Patterson for mailing (V. X 29, 31, 35).

(d) Testimony Presented on Behalf of William Kelly Brown

Brown testified that he had agreed to bring some furniture back to the United States from Thailand for William King Wright. While Brown was packing his own household goods, Chai, who at the time was unknown to Brown, brought some furniture to Brown. Chai told Brown that the furniture was for Wright, and Brown shipped it to his own home in Augusta, Georgia along with the rest of his household goods (V. X 75-76). About a week before the furniture arrived, Brown telephoned Wright about an unrelated matter. Wright expressed surprise when Brown informed him that "his" furniture would be arriving, but finally told Brown to ship it to him when it arrived (V. X 77-78). Several days after the furniture arrived, Brown was approached by Thornton while at work. The two men, who knew one another from Bangkok, agreed to have lunch later that day. They went to Brown's house where they ate, drank and generally conversed. Brown retired to the bathroom for approximately thirty minutes to take his afternoon "constitutional", after which he returned to work (V. X 80-82). Brown never saw Thornton again. He denied having assisted Thornton in removing any narcotics from any furniture (V. X 84-85).

Brown received a telephone call from Thornton after Brown had been arrested on charges of possession of heroin because traces of narcotics had been discovered on some of his household furniture (V. X 86). Thornton stated that he was sorry that Brown had been arrested and then asked Brown whether he had given the names of any persons to law enforcement agents. Brown replied that he did not know any names (V. X 87).

(e) Testimony Presented on Behalf of Rudolph Valentino Jennings

Jennings denied that he had lived at 53 Soi with Atkinson and Thomas (V. X 170). He knew both men and on occasion would visit Thomas at that address (V. X 170). He never saw Herbert Houseton at that address (V. X 172). Nor did he ever observe or participate in the packaging of narcotics at that address or any other place (V. X 174). Since his retirement from the service, Jennings testified he had made his living in various ways. He remained in Thailand, where he traded in black market goods which were unofficially sanctioned by the Thai authorities (V. X 164-165); he had bought American-made goods and sold them to Thai citizens (V. X 154); and had acted as a banker for various card hustlers (V. X 165-166).

(f) Testimony Presented on Behalf of James McArthur

McArthur denied ever having mailed any packages for Herbert Houseton and stated that the only packages he mailed to the United States during his tour in Bangkok were clothes which belonged to himself and members of his family (V. XI 8-9). These packages were prepared by his wife and daughter and addressed to McArthur's mother who lived in Liberty, Pennsylvania (V. XI 9, 57-72). McArthur denied that Houseton ever gave him AWOL bags for mailing (V. XI 11).

After retiring from the service, McArthur and his family travelled along the Eastern seaboard of the United States, visiting friends and looking for a place to settle (V. XI 14-15). During the course of these travels, he met a Sgt. Pitts, whom he had known during his tour of duty in Bangkok. Pitts was in the process of starting a wholesale import business (V. XI 17). In August 1975, McArthur

and Pitts entered into a partnership to conduct an import business, but things did not work out and the partnership was dissolved in January 1976 (V. XI 17). Recognizing that the partnership was floundering, McArthur had purchased a "Mister Furniture Man" franchise in September 1975 (V. XI 20). He remembered having telephoned Brown during October 1975. The purpose of the call was to say hello to an old friend (V. XI 30). During the course of the conversation, McArthur had informed Brown that McArthur had purchased a "Mister Furniture Man" franchise. Brown then mentioned that he had some extra furniture. McArthur told Brown that he might be interested in purchasing it for his business (V. XI 31). Several days later, Brown telephoned McArthur to inform him that the furniture which McArthur might be interested in had arrived (V. XI 42). McArthur acknowledged that he had telephoned the Arringtons later that day but denied that the purpose of the call had been narcotics-related. He stated that he had called Michael Arrington to inquire whether Arrington was interested in working for McArthur's newly-acquired franchise.

McArthur had met Arrington through his father-in-law, Leslie Atkinson. He had met Atkinson as well as Smedley, Patterson and Wright and Houseton because they all participated in a poker game which was held virtually every weekend during the time they were stationed in Bangkok (V. XI 12).

Reasons for Granting the Writ

The effective assistance of counsel is guaranteed by the Sixth Amendment. Equally clear is the notion that this assistance be untrameled and unimpaired by an attorney who simultaneously represents the conflicting interests of separate clients during a joint trial. If the right to the "assistance of counsel" means less than this, a valued Constitutional safeguard is severely impaired. *Glasser v. United States,* 315 U.S. 60, 70 (1941).

Within this framework, more than 35 years ago, this Court in *Glasser* held that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Despite the unambiguous mandate of the *Glasser* Court, the various Courts of Appeals have not uniformly interpreted *Glasser*. A wide divergence exists among the circuits as to whether the trial court has a duty of ascertaining whether a conflict of interest exists in cases of dual representation; what degree of prejudice, if any, need be shown before a conflict of interest results in the denial of effective assistance of counsel; and who has the burden of establishing prejudice, if any, in an appellate review of cases in which dual representation has occurred.

The D.C., First, Second, Third and Eighth Circuits have imposed an affirmative duty of inquiry on trial judges. *Campbell v. United States,* 352 F.2d 359 (D.C. Cir., 1965); *Lollar v. United States,* 376 F.2d 243 (D.C. Cir., 1967); *United States v. Donahue,* 560 F.2d 1039 (1st Cir., 1977); *United States v. Foster,* 469 F.2d 1 (1st Cir., 1972); *United States v. DeBerry,* 487 F.2d 448 (2nd Cir., 1973); *United States v. Carrigan,* 543 F.2d 1053 (2nd Cir., 1976); *United States ex rel. Hart v. Davenport,* 478 F.2d 203 (3rd Cir., 1973); *United States v. DeYoung,* 523 F.2d 807 (3rd Cir., 1975); *United States v. Williams,* 429 F.2d 158, 161 (8th Cir., 1970); *United States v. Lawriw,* ____F.2d____ (22 CrL 2369, 8th Cir., 12/30/77).

The Fourth Circuit, prior to deciding the case at bar, also appeared to require such an inquiry. *United States v. Truglio,* 493 F.2d 574 (4th Cir., 1974). However, the instant case apparently shifts that burden from the court to the defendants.

The Fifth, Sixth, Seventh and Ninth Circuits do not require trial courts to automatically advise a defendant of

the right to separate counsel; rather they place the burden on defense counsel. *United States v. Boudreaux,* 502 F.2d 557 (5th Cir., 1974); *United States v. Lariche,* 549 F.2d 1088 (6th Cir., 1977); *United States v. Mandell,* 525 F.2d 671 (7th Cir., 1975); and *United States v. Christopher,* 488 F.2d 849 (9th Cir., 1973).

This case, in which there was dual representation and no judicial inquiry, presents an appropriate vehicle for this Court to harmonize the clear and continuous division among the circuits on the issue of the role of the trial court in determining whether a conflict of interest exists, and properly advising the defendants of the dangers inherent therein.

Similarly, this case presents the Court with an opportunity to harmonize the conflict among the circuits as to what degree of prejudice, if any, need be shown before a conflict of interest is shown to result. Compare *Campbell v. United States, supra* (informed speculation) and *Hart v. Davenport, supra* (possible conflict of interest or prejudice however remote) with *United States v. Huntley,* 535 F.2d 1400 (5th Cir., 1976) (actual, significant conflict of interest) and *Miller v. Cox,* 457 F.2d 700 (4th Cir., 1972) (a significant conflict of interest).

Finally, this case presents the Court with an appropriate vehicle for determining the applicable standards of review in the many recurring conflict of interest cases. Compare *Lollar v. United States, supra* (failure to aprise defendant shifts the burden to the government to demonstrate beyond a reasonable doubt that a conflict of interest did not exist); *United States v. Foster, supra* and *United States v. Carrigan, supra* (failure to make judicial inquiry shifts the burden to the government to prove that prejudice to the defendant was "improbable"); and *United States v. Lawriw, supra* (a minimal showing of conflict invokes the constitutional protection) with *United States v. Wayman,* 510 F.2d 1020 (5th Cir., 1975) and

United States v. Luciano, 343 F.2d 172 (4th Cir., 1965) -- (burden on defendants to demonstrate actual significant conflict of interest).

Perusal of the above authority leads to the inescapable conclusion that the various Circuit Courts of Appeals have been unable to agree on any coherent and uniform standard for determining what constitutes conflict of interest. Yet, for all this confusion and disagreement, this court has refused to consider the problem in any meaningful way.[12] This despite the fact that the past decade has witnessed a proliferation of cases in which a conflict of interest issue based upon dual representation has been raised and decided in vastly diverse and often contradictory ways. See, for example, *Kaplan v. Bombard,* ____F.2d____ (2nd Cir., 1978, Slip Op. 1585, Mansfield, J. concurring at 1598). As one commentator has noted: "Each circuit continues to struggle to formulate its own rules and approaches. Each year the confusion grows greater among the circuits. The end result is that the law in regard to the Sixth Amendment right, the effective assistance of counsel, has developed without cohesion of thought or unity of purpose." *Hyman, Joint Representation of Multiple Defendants in a Criminal Trial, The Court's Headache,* 5 Hofstra L.Rev. 315, 319-320 (1977).

As we will demonstrate below, this case presents an appropriate vehicle for this Court to resolve the wide differences that presently exist.

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[12] In *Holloway v. State of Arkansas,* 539 S.W. 2d 435 (1976), Cert. granted, ____U.S.____, 1977, the Court agreed to hear argument on a State case raising the general issue of conflict of interest where one attorney has represented multiple defendants. Although argument has been heard, no decision has yet been forthcoming. See also, *Dukes v. Warden,* 406 U.S. 250 (1972).

Argument

I.

The Rule of Affirmative Judicial Inquiry Preserves the Defendant's Sixth Amendment Right to the Effective Assistance of Counsel and Also Results in the Conservation of Judicial Resources

A. The Protection of the Defendant's Sixth Amendment Right

The potential conflicts of interest which exist, when as here, multiple criminal defendants are represented by the same counsel, have long been recognized by courts of appellate jurisdiction. In the seminal case of *Glasser v. United States, supra,* a defendant was represented by counsel of his co-defendant. In reversing *Glasser's* conviction because of a conflict of interest, this Court held:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U.S. 97, 116; Tumey v. Ohio, 273 U.S. 510, 535; Patton v. United States, 281 U.S. 276, 292. And see, McCandless v. United States, 298 U.S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance."

The danger of a conflict is so severe in such a situation that the American Bar Association has recommended that dual representation be undertaken only in the most extraordinary case.

> "The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

ABA Standards Relating to the Prosecution Function and the Defense Function, Section 3.5 (Approved Draft 1971) at 211, 213. See also, P. Wilson, *Pattern Rules of Court and Code Provisions (prepared for the Committee on Implementation of Standards for the Administration of Criminal Justice of the Section of Criminal Justice of the ABA,* 1975), at 38, 39.

In view of these considerations, Petitioners urge that the Court below had the burden at the outset of this criminal conspiracy prosecution where multiple-defendant representation existed to determine whether a potential conflict of interest existed; to advise the defendants of the risk inherent in a dual representation situation; and if necessary to obtain a knowing and intelligent waiver of the defendants' right to separate counsel. Cf. *Kaplan v. Bombard, supra.*

Petitioners' position is grounded upon the following bases. First, the affirmative judicial inquiry approach is in harmony with and is the logical extension of this Court's decision in *Glasser, supra.* Second, the alternative of relying upon post-trial review to determine whether a conflict existed does not adequately protect a defendant's right to separate counsel because the trial record does not

always reveal the full extent to which a defendant suffered impaired counsel due to a conflict of interest, and post-conviction review relies too heavily upon trial counsel in determining whether a conflict of interest existed.

In *Glasser, supra,* this Court squarely held that the right to separate counsel was too fundamental to allow courts to engage in "nice calculations" as to the amount of prejudice arising from its denial. The approach of affirmative judicial inquiry thus most closely approximates this Court's articulation of the fundamental nature of the right in issue by prophylactically injecting the court into the proceedings at a stage prior to the occurrence of the damage which may result from dual representation. *Glasser, supra,* 315 U.S. at 71.

Moreover, relying upon post-trial review to determine whether a conflict existed does not adequately protect a defendant's basic rights because the trial record oftentimes will not reveal the full extent to which a defendant may have suffered impaired counsel because of a conflict of interest. As the D.C. Circuit observed:

> "Like the famous tip of the iceberg, the record may not reveal the whole story; apparently minor instances in the record which suggest co-defendants' conflicting interests may well be the telltale signs of deeper conflict." *Lollar v. United States, supra,* 376 F.2d at 246-247. See also, *United States v. Foster, supra,* 469 F.2d at p. 4.

One example of where a conflict of interest exists but would not appear in the trial transcript is when a defendant does not testify on his own behalf out of deference to jointly-represented co-defendant. See, e.g., *United States v. Gaines,* 529 F.2d 1038 (7th Cir., 1976); *Morgan v. United States,* 396 F.2d 110 (2d Cir., 1969); *United States v. DeBerry, supra.* The same is true where a defendant's attorney elects to use only a joint defense and discards a

possible defense which was available to only one defendant. *United States v. DeYoung, supra* at 809; *Austin v. Erickson,* 477 F.2d 620, 624 (8th Cir., 1976).

Those circuits which have rejected the affirmative judicial inquiry approach have placed the burden of ascertainment of a conflict of interest upon trial counsel. See, e.g., *United States v. Mandell, supra,* and *United States v. Jeffers,* 520 F.2d 1256 (7th Cir., 1975). This approach, however, is unsatisfactory in that it relies upon the attorney who may have caused the conflict to acknowledge his initial misjudgment, thus placing counsel in a further conflict of interest:

> "An evidentiary hearing would force (the defendant's) attorney into a new conflict of interest in which his own personal and professional interest would be in conflict with his client's interest. While we should not presume that the attorney's testimony would be influenced by such a conflict, the appearance of justice would be ill-served by making (the defendant's) right to a new trial by reason of his attorney's conflict of interest perhaps dependent on whether that same attorney can rise above a new conflict involving his own interest." *United States v. Gaines, supra* at p. 1045.

Moreover, the case law reveals numerous instances where experienced attorneys were unaware of the existence of a potential or actual conflict of interest. For example, in *United States v. Gaines, supra* at 1045, the court denounced "the blindness of counsel to a potential conflict of interest." See also, *United States v. Georvassilis,* 498 F.2d 883, 886 (6th Cir., 1974) ["defense counsel should have realized that a vigorous defense (of a co-defendant) would have been detrimental to defendant"] and *United States v. Marshall,* 488 F.2d 1169, 1191 (9th Cir., 1973) ["counsel seems to have had no realization that there was a conflict of interest"].

The fact that no one is apparently aware of the conflict does not, of course, diminish the constitutional problem. The *Marshall* court pointed out: "That no one seems to have been aware of the conflict or the error does not save the conviction; rather it emphasizes the fact that (the defendant) did not get the effective assistance of counsel to which he was entitled." 488 F.2d at 1193.

However, regardless of whether or not one adheres to the approach of affirmative judicial inquiry, no circuit, other than the court in the instant case, has placed the primary duty for ascertaining whether a conflict of interest existed upon the defendant himself. The rationale for not doing so was best stated by the D.C. Circuit in *Campbell, supra*:

> "An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Considerations of efficient judicial administration as well as important rights of defendants are served when the trial judge makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel." 302 F.2d at 360.

B. Conservation of Judicial Resources

Equally important, the affirmative judicial inquiry approach conserves scarce judicial resources. The need for

post-conviction evidentiary hearings is obviated.[13] Appeals based upon a claimed conflict of interest will also be simplified. If the Circuit Court finds from the written record that the trial court had adequately and properly discharged its duty of inquiry, a waiver of the right to separate counsel could be found, thus eliminating the need for the appellate court to indulge in the "nice calculations" as to the amount of prejudice which a defendant may have suffered as a result of an alleged conflict.

II.

The Conflict Among the Circuits As to What Facts and Circumstances Constitute a "Prejudicial Conflict of Interest"

In addition to the circuits being divided on the question of what is the proper role of the trial court in a multiple representation situation, there is a sharp and long-standing conflict among the various circuits as to what factual settings constitute a prejudicial conflict of interest. In the instant case, the Court of Appeals held that "some specific instances of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist" and discerned no conflict of interest or resultant prejudice to any of the Petitioners herein. Yet, as clearly demonstrated *infra,* under facts and circumstances indistinguishable from those in the instant case, courts of differing circuits have consistently found a prejudicial conflict of interest. Several examples as to each Petitioner should suffice to illustrate the problem.

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[13] "The concept of relying upon a post-conviction hearing to determine whether a conflict of interest existed in a dual representation situation was first suggested in *Morgan v. United States, supra.* It may be noted that the Second Circuit itself has abandoned this approach in favor of the position urged by Petitioners herein. See, e.g., *United States v. Carrigan, supra.*

Michael Arrington

At trial, Michael and Sharon Arrington were represented by one attorney who at times also represented the Petitioner Atkinson. Perhaps the most striking conflict of interest arose as a result of the fact that Sharon testified while Michael did not (V. IX 6 *et seq.*). During the course of her testimony, Sharon generally denied complicity in the conspiracy charged and suggested that Thornton, the Government's witness-in-chief, was fabricating his narrative as it applied to her (V. IX 6-51). While attempting to exculpate herself, she made statements with respect to her husband which, if believed, corroborated Thornton's testimony against Michael.

In *United States v. DeBerry, supra,* one of two defendants who had retained single counsel testified and inferentially incriminated his co-defendant. The Court of Appeals for the Second Circuit reversed the convictions of both testifying and non-testifying defendants. The Court held:

> "The possibility of a conflict of interest is present especially where there is a question as to whether either or both of the defendants should take the stand. . .The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. *And if, where two defendants are represented by the same attorney, one defendant elects to take the stand and* the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the stand is almost inescapable." 487 F.2d at p. 453 (emphasis supplied).

Here, not only was there inherent prejudice "in the eyes of the jury" because Sharon testified and Michael did not, *United States v. DeBerry, supra,* but as noted in *Morgan v. United States, supra,* Sharon's narrative as it developed disclosed several matters which were harmful to Michael's cause. See, *United States v. Carrigan, supra;*

Sawyer v. Brough, 358 F.2d 70 (4th Cir., 1966); *Case v. North Carolina* 315 F.2d 743 (4th Cir., 1963); *Holland v. Boles,* 255 F.Supp. 863 (D.C. W.Va., 1963) and Note -- *Co-defendants and the Sixth Amendment: The Case for Separate Counsel,* 58 GEO. L.J. 369 (1969).

Any remaining doubt that Michael Arrington was severely prejudiced by his wife's testimony, juxtaposed with his failure to offer any defense, is put to rest by an analysis of summation of their mutual attorney (V. XIII 45-57) who gave up Michael in an attempt to save Sharon.

Moreover, had Michael had independent counsel, he could have attempted to present the defense of "mere presence." It was to his interest to put whatever blame there was on his wife and father-in-law. Yet counsel seems to have had no realization that there was a conflict of interest between Sharon and Michael. The result was that their joint attorney spent almost his entire effort in establishing Atkinson's innocence and Michael became the forgotten man in the trial. Moreover, the lack of independent counsel for Michael hindered the development of the distinguishable position of him and his wife. *Glasser v. United States, supra; United States v. Marshall,* 488 F.2d 1169, 1191-94 (9th Cir., 1973); *Sanchez v. Nelson,* 446 F.2d 849, 850 (9th Cir., 1971); *Craig v. United States,* 217 F.2d 355, 359 (6th Cir., 1954); *United States v. DeYoung, supra;* and *Holland v. Henderson,* 460 F.2d 978 (5th Cir., 1970).

Leslie Atkinson

At trial, Petitioners Atkinson and McArthur were represented by a single attorney. McArthur testified and presented other witnesses on his behalf, while Atkinson did not testify and did not present a defense. This constituted a clear conflict of interest under *Morgan v. United States, supra* and *United States v. DeBerry, supra.*

The record further supports a finding that Atkinson abandoned a separate defense he had and may not have taken the stand out of deference to his jointly-represented co-defendant.

Prior to trial, Atkinson's counsel made it clear that Atkinson's defense would be that after his plea of *nolo contendere* in 1975, he had abandoned any participation in illegal narcotics activities and that an organization, headed by Thornton, was responsible for the activities with which Atkinson presently was charged (A. 476, 481, and Affidavit of James Smedley). It is equally clear that Atkinson did not present this defense at trial, but simply joined in the defense of his other co-defendants which consisted primarily in attacking Thornton's credibility as a witness.

The fact that a defendant has a separate defense to the charges available which is not presented at trial is evidence that he may have foregone the presentation of his separate defense out of deference to his jointly-represented co-defendants. See, *United States v. DeYoung, supra,* at 809. Because the trial court had declined to continue the trial to enable the defense to obtain the deposition testimony of Smedley and Myrick, which was supportive of Atkinson's separate defense, the only way in which Atkinson could have gotten his defense before the jury was to have testified in his own behalf. Yet his testimony might have been embarrassing to McArthur, for it may have indicated that although Atkinson had abandoned, his jointly-represented co-defendant may have been involved as charged.

The failure to present a separate defense, which Petitioner Atkinson's counsel prior to trial made clear he would rely upon, constitutes a prejudicial conflict of interest. *United States v. Gaines, supra* at 1044-1045; *United States ex rel. Hart v. Davenport, supra; United States v. Hernandez,* 476 F.2d 791 (3rd Cir., 1973); *United States v. Johns,* 447 F.2d 69 (3rd Cir., 1971). Whether the defense would have succeeded is not material.

> "We do not speculate whether or not the defense of lack of responsibility could have been successfully developed and asserted on behalf of Austin. Whether successful or unsuccessful, the defense was not developed because of counsel's divided loyalties and the possible damage to Goode." *Austin v. Erickson,* 477 F.2d 620, 624 (8th Cir., 1973).

See also, *Case v. North Carolina,* 315 F.2d 743, 744 (4th Cir., 1963).

Sharon Arrington

Although perusal of the trial transcript reveals that Sharon and Michael Arrington were represented at trial by Mr. MacRae, close analysis of the entire record demonstrates that MacRae's primary responsibility was to assist in the protection of the interests of Sharon's father, the Petitioner Atkinson (V. VII 31-33, V. V 165-179). The result of this well-intentioned duality of representation was, however, to deny Sharon the effective assistance of counsel.

The prejudice to her was manifested in several ways. First, she was compelled to accept the joint representation of her husband and herself by Mr. MacRae. This, despite their divergent interests. Second, she was inextricably tied to her father (against whom there was overwhelming evidence) by common counsel; and third, inasmuch as her attorney spent more time both prior to and during trial representing her father, her own defense was neglected. One example should suffice.

One of the most vicious concepts known to our system of law is guilt by association. When association is cemented through the use of common counsel, the guilt of one of the defendants is inevitably passed to his co-defendant. *People v. Chacon,* 69 Cal.2d 765 (1968). This association becomes even more prejudicial when, as here, there is a disparity between the weight of the evidence

against one co-defendant and that against the other. *People v. Baker,* 268 Cal. App.2d 270, 73 Cal. Rptr. 758 (1968); *Caddie v. Warden,* 3 Md. App. 192, 238 A.2d 129 (1968). In the instant case, Sharon's association with her father through MacRae as their common counsel clearly prejudiced her defense.

Viewing the evidence in a light most favorable to the prosecution, Sharon's participation in the alleged conspiracy was far more limited than that of her father. Although the proof demonstrated that the conspiracy began as early as February 1974 (V. II 260-262), Sharon did not become enmeshed until August 1975 following her father's incarceration in Atlanta Penitentiary. Despite her relatively limited role, Mr. MacRae, apparently acting in the interest of her father, sought to and did cross-examine witnesses who failed to inculpate Sharon. (See, for example, V. III 43-63; V. IV 42 *et seq.*; V. V 132 *et seq.;* V. V 150; V. V 187 *et seq.;* V. VI 109 *et seq.;* V. VII 14 *et seq.;* V. VII 73). This strategy, coupled with the inappropriate cross-examination of the one witness against her and his failure to be present when incriminating evidence was presented against her, severely damaged her defense. See, *Craig v. United States, supra* at 358-359.

James McArthur

Perhaps the most egregious conflict of interest in the instant case arose as a result of the representation of Petitioners McArthur and Atkinson by Mr. Nimocks (A. 1, A. 23, V. XII 180). Viewing the evidence in a light most favorable to the Government, McArthur emerges as a rather minor participant while Atkinson was clearly the "kingpin" of the alleged conspiracy. As a result, McArthur was denied the effective assistance of counsel in two separate and distinct ways: first, inasmuch as Nimocks was concerned primarily with the representation of Atkinson, McArthur's defense and other possible courses of action were limited; and second, through association by

common counsel, McArthur was inextricably bound to the evidence, fortunes and fate of Atkinson. But for the testimony of Herbert Houseton, the Petitioner McArthur was literally a phantom defendant. Though the trial lasted approximately three weeks and consumed over 3,000 pages of trial transcript, the direct evidence against McArthur is principally contained in 15 pages of direct examination of the witness Houseton and covered a time frame of five months in the Fall of 1974 (V. VI 15-31). On the other hand, Atkinson's involvement covered a time span of 19 months (February 1974 - October 1975) and the record was replete with instances of his culpability. Despite this gross disparity, the jury was continually reminded that both defendants were represented by a single counsel. For example, although Thornton, the Government's witness-in-chief, did not directly inculpate McArthur, Nimocks spent several hours cross-examining him (V. II 55 *et seq.*). Similarly, although the witness Patterson actually gave exculpatory evidence as to McArthur and inculpated Atkinson, their lawyer felt obliged to cross-examine on behalf of McArthur (V. IV 127). Had McArthur had independent counsel, a far different approach to these two witnesses may have been used. In fact, if one assumed that Nimocks was representing only McArthur, the record becomes a "model of inappropriate cross-examination" of witnesses who fail to directly or indirectly incrminate one's client. (See, for example, V. IV 4 *et seq.; ibid.* 53 *et seq.; ibid.*78 *et seq.; ibid.*127; V. V 9, 26; V. VII 10 *et seq.;* and *United States v. DeYoung, supra*).

William Thomas, Rudolph Jennings, William Kelly Brown, and Monroe Martin, Jr.

William Thomas, Rudolph Jennings and William Kelly Brown were represented by a single counsel, to wit: Mr. Anthony Rand. Petitioner Monroe Martin and Defendant, Charles Gillis, were represented by a single counsel, to wit: Mr. Bobby Deaver.

Prior to trial, a motion for severance had been made and denied. Petitioners were never apprised by the Court of the dangers of joint representation nor was their counsel asked about possible conflicts of interest in such representation.

Of the above four Petitioners, all took the stand except William Thomas. As Mr. Rand well knew or should have known, thorough examination in the defense of each of his defendants was severely constrained by the joint representation.

Such constraint revealed itself in his inability or refusal to call William Thomas to the stand to corroborate Jennings' denial that he had lived at 53 Soi with Thomas (V. V 170). Mr. Rand did not call Thomas to corroborate Jennings' statement that he never observed or participated in the packaging of narcotics at the 53 Soi address (V. X 172). He could not have zealously and effectively aided Jennings when his client and co-defendant, Thomas, would not take the stand. Exculpatory aid was at hand for Jennings, but could not be used because of the inability of Mr. Rand to escape aiding one of his clients and damning the other.

Similarly, Brown was denied the exculpatory and corroborative aid of Thomas as Thornton's testimony concerning a meeting held at Johnson Air Force Base discussing the pick-up of narcotics from Brown. Surely, Thomas' testimony could have provided Brown with exculpation at that event. And, certainly, Mr. Rand would have been placed in a position of damning Thomas to save Brown had Thomas testified that the above subject was discussed.

As to Petitioner Martin, who was jointly represented with Gillis by Mr. Bobby Deaver, at no time was there effective examination of Gillis to corroborate Martin's

denial of ever using labels, arranged by Gillis and Thornton, to mail narcotics labelled as military cargo to the United States. Mr. Martin had a living witness who could have provided trial aid but was unable to effectively utilize him (Gillis) owing to their joint counsel. Mr. Deaver's choice of saving one defendant and sacrificing the other culminated in an obstinate inability to effectively aid either, each to their detriment. See *United States v. Burham,* 477 F.2d 1137 (3rd Cir., 1973).

III.

The Conflict Among the Circuits As to Which Party Has the Burden of Proof

Finally, there is a clear and long-standing division among the circuits as to which party bears the burden of proof where a defendant claims that he was deprived of his Sixth Amendment right by dual representation. Again, the division among the circuits is reflective of a particular circuit's view of the trial court's role and responsibility in multiple representation situations. The "affirmative duty judicial inquiry" circuits generally hold that failure of the trial court to warn the defendant of the risks inherent in multiple representation and obtain a meaningful waiver of the right to separate counsel places the burden on the Government to establish that a conflict did not exist or was unlikely. *Lollar v. United States* (D.C. Cir.), *supra* [burden on Government to prove that prejudice to the defendant was improbable]; *United States v. Carrigan,* (2nd Cir.), *supra* [lack of satisfactory judicial inquiry shifts the burden of proof on the question of prejudice to the Government]; *United States ex rel. Hart v. Davenport* (3rd Cir.), *supra* [possible showing of conflict or prejudice by defendant, however remote]; *United States v. Lawriw* (8th Cir.), *supra* [only a minimal showing of conflict by the defendant required].

The circuits which have placed the burden for the ascertainment of a conflict and disclosure of the dangers inherent in a multiple representation situation upon trial counsel have placed the burden of proof for establishing a prejudicial conflict of interest upon the appellant. *United States v. Wayman* (5th Cir.), *supra,* and *United States v. Luciano* (4th Cir.), *supra* [burden on defendant to establish an actual, significant conflict of interest]. The Court of Appeals in the instant case aligned itself with the latter line of cases ruling that "some specific instance of prejudice, some real conflict of interest. . .must be shown to exist." Because the instant case presents a myriad of factual settings in which those circuits which have adopted the rule of affirmative judicial inquiry would clearly have found that the Government had not sustained its burden of showing the prejudice was "unlikely" or "improbable", whereas the Fourth Circuit held Petitioners had not met their burden of proof, it is an appropriate case for review.

The clear conflict among the circuits as to what facts and circumstances constitute a prejudicial conflict of interest as shown in the above cases results from the various standards adopted by the circuits as to what degree of prejudice, or, to what extent a conflict of interest must exist before it may be said to have resulted in the deprivation of a defendant's Sixth Amendment right. Those circuits which have imposed an affirmative duty of inquiry upon the trial judge recognize the fact that the conflict may not appear full-blown upon the record, and have been more sensitive to the difficulties faced by both the court and counsel in attempting an after-the-fact reconstruction of the prejudice which may have resulted from dual representation. See, for example, *United States v. Foster, supra.* The test adopted by these circuits for determining what degree of prejudice must be shown before a conflict of interest is deemed to have resulted is reflective of these considerations. Thus, the District of

Columbia Circuit is willing to engage in informed speculation from the record, while the Third Circuit requires only that a possible conflict of interest or prejudice, however, remote, be shown. *Campbell v. United States, supra,* and *United States ex rel. Hart v. Davenport, supra.* Those circuits which have placed primary responsibility for the ascertainment of a conflict of interest upon trial counsel have required that the conflict of interest be established by the record. *United States v. Huntley, supra* [actual significant conflict of interest must exist] and *Miller v. Cox, supra* [a significant conflict of interest must exist]. Thus, under the varying standards which exist among the circuits, it is clear that the same factual pattern may be deemed to have resulted in the deprivation of the right to the effective assistance of counsel in some of the circuits, while other circuits may "discern no conflict of interest or resultant prejudice." The instant case, which is literally pregnant with facts and circumstances under which other circuits have consistently found a prejudicial conflict of interest to exist, but in which the Court of Appeals discerned "no conflict of interest or resultant prejudice to any of the appellants", provides an appropriate vehicle for this Court to harmonize this conflict.

Conclusion

The problem of under what circumstances the joint representation of criminal defendants by a single attorney constitutes the deprivation of the effective assistance of counsel is one which has increasingly come to the attention of the federal courts of appeals. Despite the unambiguous mandate which was set forth by this Court nearly forty years ago in *Glasser,* no uniformity among the circuits exists as to any of the issues which repeatedly exist when the deprivation of the right to the effective assistance of counsel because of a conflict of interest is raised. Each circuit struggles to articulate its own rules on such important

questions as what is the role and responsibility of the trial court for ascertaining whether a conflict of interest exists; and which party has the burden of proof of establishing that a prejudicial conflict exists. Although this Court has not reviewed the conflict of interest issue in a dual representation situation since its decision in *Glasser, certiorari* has been recently granted in a state case which raises the general issue. *Holloway v. State of Arkansas, supra.* The instant case is a particularly appropriate vehicle for this Court to harmonize the conflicts which have been shown to exist among the Circuits in that it clearly raises each of the issues which exist in a cross representation situation. For these reasons, a Writ of Certiorari should issue to review the Judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JOHN L. POLLOK, ESQ.

and

RICHARD B. MAZER, ESQ.
Attorneys for Petitioners

APPENDIX

Appendix A - Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2168

United States of America, Appellee,

versus

Leslie Atkinson, Appellant.

No. 76-2169

United States of America, Appellee,

versus

William Kelly Brown, Appellant.

No. 76-2170

United States of America, Appellee,

versus

Monroe Lorenzo Martin, Jr.,
aka Jimmy, Appellant.

No. 76-2171

United States of America, Appellee,

versus

William Thomas, Appellant.

No. 76-2172

United States of America, Appellee,

versus

Rudolph Valentino Jennings, Appellant.

No. 76-2173

United States of America, Appellee,

versus

James McArthur, Appellant.

No. 76-2174

United States of America, Appellee,

versus

Leslie Sharon Atkinson Arrington, Appellant.

No. 76-2175

United States of America, Appellee,

versus

Michael Otis Arrington, Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. F.T. Dupree, Jr., District Judge.

Argued November 11, 1977 Decided December 8, 1977

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge; HALL, Circuit Judge.

John L. Pollok (Hoffman Pollok Mass & Gasthalter on brief) for Appellants in 76-2173, 76-2174 and 76-2175; Wilbur C. Fuller for Appellants in 76-2169, 76-2170, 76-2171 and 76-2172; Richard B. Mazer for Appellant in 76-2168; Christine Witcover Dean, Assistant United States Attorney (George M. Anderson, United States Attorney, and Ann B. Wall, Third Year Law Student on brief) for Appellees in 76-2168 through 76-2175.

FIELD, Senior Circuit Judge:

The eight appellants, along with six other individuals, were charged in an indictment under 21 U.S.C § 963 with a conspiracy to import narcotics into the United States in violation of 21 U.S.C § 952. Additionally, the appellants, Sharon Atkinson Arrington, Michael Otis Arrington and Leslie Atkinson, were charged with substantive violations of 21 U.S.C. § 841(a)(1). Following a lengthy trial the jury returned verdicts of guilty on all counts and these appeals followed.

Upon appeal counsel have assigned reversible error in sixteen respects but, primarily, they urge upon us that the representation of multiple defendants by the same trial attorney resulted in a denial of the effective assistance of counsel. The record indicates that one attorney, Stephen H. Nimocks, represented all of the defendants in their initial appearance before the magistrate. Thereafter, however, other attorneys were retained resulting in the

following alignment. Appellants Atkinson and McArthur continued to be represented by Nimocks; Sharon Arrington and Michael Arrington, her husband, were represented by James C. MacRae; Monroe Martin was represented by Bobby G. Deaver; and William Thomas, Rudolph Jennings and William Brown were represented by Anthony E. Rand.

In support of their contention, counsel for appellants rely upon *Glasser v. United States,* 315 U.S. 60 (1942), together with two cases from this circuit, *United States v. Truglio,* 493 F.2d 574 (1974), and *Sawyer v. Brough,* 358 F.2d 70 (1966). In each of those cases, however, the record disclosed a patent conflict of interest which impaired the defendants' right to the unfettered and effective assistance of counsel. In *Glasser,* the possibility of the inconsistent interests of the two defendants was brought home to the court prior to trial, and Glasser had made it clear that he desired "the benefit of the undivided assistance of counsel of his own choice." 315 U.S. at 75. In addition, the recital of developments during the trial in that case demonstrated that the multiple representation was prejudicial to Glasser's defense. Similarly, in *Truglio* the record confirmed the conflict and prejudice which resulted from the representation of the five defendants by one attorney; and, in *Sawyer,* we noted that the two defendants occupied "adversary and combative positions" and concluded "that it would be utterly impossible for one attorney to effectively serve both of these conflicting interests." 358 F.2d at 73.

Unlike those cases, counsel for appellants have failed to point out any specific conflict between the various defendants who were represented by the same counsel, but urge upon us that prejudice is inherent in such an arrangement and that the district judge should have conducted a

hearing in advance of trial to determine whether any conflict existed. It is true, as the court observed in *United States v. Lovano,* 420 F.2d 769, 772 (2 Cir. 1970):

> The very fact that two or more co-defendants are represented by the same counsel should alert a trial judge and cause him to inquire whether the defenses to be presented in any way conflict. This is especially true where the trial judge appoints counsel for defendants under the Criminal Justice Act. (Citation omitted.)

However, the court went on to hold "that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." *Id.* at 773.

In our opinion, the principle applied in *Lovano* is appropriate in the present case. The appellants themselves retained their counsel which resulted in the multiple representation, and they, more than anyone, including the court, were in a position to know what facts might be developed at trial. Apparently they concluded that such representation was advantageous, and it should be noted that at no time, either prior to the trial or during the course thereof, was the issue of such multiple representation raised in any fashion. See *United States v. Luciano,* 343 F.2d 172 (4th Cir., 1965). Since we discern no conflict of interest or resultant prejudice to any of the appellants, we cannot accept their contention that they were denied the effective assistance of counsel.

Appendix A - Opinion of the Court of Appeals

We have carefully considered the remaining fifteen assignments of error and find them to be without merit.

> It is a commonplace in the administration of criminal justice that the actualities of a long trial are too often given a meretricious appearance on appeal; the perspective of the living trial is lost in the search for error in a dead record. *Glasser v. United States,* 315 U.S. at 88 (Frankfurter, J., dissenting opinion).

The convictions are affirmed.

AFFIRMED.

Appendix B - Order of the Court of Appeals and Decision on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2168

United States of America, Appellee,

versus

Leslie Atkinson, Appellant.

No. 76-2169

United States of America, Appellee,

versus

William Kelly Brown, Appellant.

No. 76-2170

United States of America, Appellee,

versus

Monroe Lorenzo Martin, Jr.,
aka Jimmy, Appellant.

No. 76-2171

United States of America, Appellee,

versus

William Thomas, Appellant.

Appendix B - Order of the Court of Appeals and Decision on Petition for Rehearing and Suggestion for Rehearing En Banc

No. 76-2172

United States of America, Appellee,

versus

Rudolph Valentino Jennings, Appellant.

No. 76-2173

United States of America, Appellee,

versus

James McArthur, Appellant.

No. 76-2174

United States of America, Appellee,

versus

Leslie Sharon Atkinson Arrington, Appellant.

No. 76-2175

United States of America, Appellee,

versus

Michael Otis Arrington, Appellant.

Appendix B - Order of the Court of Appeals and Decision on Petition for Rehearing and Suggestion for Rehearing En Banc

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. F.T. Dupree, Jr., District Judge.

Upon consideration of the appellant's motion and affidavit in support of motion for extension of time in which to file petition for rehearing, by counsel,

IT IS ORDERED that the time is extended to and including *January 6, 1978.*

FOR THE COURT - BY DIRECTION

/s/ William K. Slate, II

CLERK

Appendix B - Order of the Court of Appeals and Decision on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2168

United States of America, Appellee,

versus

Leslie Atkinson, Appellant.

No. 76-2169

United States of America, Appellee,

versus

William Kelly Brown, Appellant.

No. 76-2170

United States of America, Appellee,

versus

Monroe Lorenzo Martin, Jr.,
aka Jimmy, Appellant.

No. 76-2171

United States of America, Appellee,

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William Thomas, Appellant.

Appendix B - Order of the Court of Appeals and Decision on Petition for Rehearing and Suggestion for Rehearing En Banc

No. 76-2172

United States of America, Appellee,

versus

Rudolph Valentino Jennings, Appellant.

No. 76-2173

United States of America, Appellee,

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James McArthur, Appellant.

No. 76-2174

United States of America, Appellee,

versus

Leslie Sharon Atkinson Arrington, Appellant.

No. 76-2175

United States of America, Appellee,

versus

Michael Otis Arrington, Appellant.

Appendix B - Order of the Court of Appeals and Decision on Petition for Rehearing and Suggestion for Rehearing En Banc

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. F.T. Dupree, Jr., District Judge.

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Field for a panel consisting of Judge Butzner, Judge Field and Judge Hall.

FOR THE COURT,

/s/ William K. Slate, II
CLERK

Appendix C - Order of the Supreme Court of the United States Extending Time to File This Petition

SUPREME COURT OF THE UNITED STATES

No. A-642

LESLIE ATKINSON, ET AL.,
Petitioners,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 17, 1978.

/s/ Wm. J. Brennan, Jr.

Justice of the United States.

Dated this 31
day of January, 1978

Appendix D - 21 U.S.C. § 952

952. Importation of controlled substances—Controlled substances in schedules I or II and narcotics drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of sub-chapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Appendix D - 21 U.S.C. § 952

Nonnarcotic controlled substances in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate use, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

Coca leaves

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

Appendix E - United States Constitution, Sixth Amendment

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.